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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY HUY HAVENS,

Defendant and Appellant.

F057461

(Super. Ct. No. 1223885)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Levy, A.P.J., Cornell, J., and Kane, J.

Appellant, Tony Huy Havens, pled no contest to three counts each of grand theft (counts 1, 5, & 11/Pen. Code, § 487, subd. (a)),<sup>1</sup> obtaining property by false pretenses (counts 2, 6, & 12/§ 532, subd. (a)), and eight counts of forgery (3-4, 7-10, & 13-14/ § 470, subd. (d).) Havens also admitted allegations that his fraudulent conduct resulted in the taking of more than \$100,000 (§ 186.11, subd. (a)(1)).

On February 2, 2009, the trial court sentenced Havens to an aggregate term of five years four months. On appeal, Havens contends: 1) his sentence violates section 654's prohibition against multiple punishment; and 2) he was denied the effective assistance of counsel. We will find merit to Havens's first contention. In all other respects, we will affirm.

## **FACTS**

### ***The Miller Investment***

On March 21, 2003, Patty Lindh gave Havens \$20,000 which Havens was to loan to Ron Miller to renovate a business Miller owned. Lindh was to receive \$23,000 on June 30, 2003. Havens gave Lindh a promissory note and a deed of trust each ostensibly signed by Miller and secured by property owned by Miller. Miller, however, never signed either document and Havens never gave him the money.

Thereafter, Lindh spoke with Havens about her investment and he told her that the loan had been extended. In July 2003, Havens gave a letter to Lindh dated July 2, 2003, purportedly written by Miller and notarized by John Martinez, asking for an extension until July 16, 2003, to pay the loan. Miller did not prepare or sign the letter. Nor did Martinez notarize it.

On July 23, 2003, Lindh received a second letter purportedly from Miller asking for another extension of the loan. The letter was allegedly signed by Miller with Havens

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<sup>1</sup> Unless otherwise indicated all further statutory references are to the Penal Code.

signing as a witness. It was ostensibly notarized by John Martinez but did not get logged into his notary journal.

During an interview with an investigator, Havens stated that of the \$20,000 he borrowed from Lindh, he lent \$7,000 to Miller's son and he did not know what happened to the remaining \$13,000. He also admitted that none of the money went to Miller and that the signatures on the documents relating to that transaction were forged.

### ***The Brett Lane Investment***

Havens also told Lindh about an investment opportunity involving a foreclosed property on Brett Lane in Modesto that would require an investment by Lindh of \$84,450. Havens told Lindh that they would pay an equal amount to buy the house. They would then renovate the house, sell it for \$225,000 within four months, and divide the profit equally. Lindh wired \$50,000 to a bank account in the name of Havens's business partner. The remainder she gave to Havens in a cashier's check. Lindh received from Havens a residential purchase agreement and joint escrow instructions. The initial transaction occurred on May 16, 2003.

Havens admitted to an investigator that there was no proposed sale to Lindh of the Brett Lane property and that it was just a tactic to stall on repaying Lindh. According to Havens, Marsha Tanaka owned the house on Brett. Havens provided Lindh with a purchase agreement and two addendums for the purchase of the Brett Lane property. One addendum was a document that showed escrow had opened and the other dealt with a \$7,000 credit towards closing costs.

On July 7, 2003, John Roos recorded a document showing he bought the Brett Lane property and that escrow on the sale closed on May 14, 2003, two days before Havens presented the package to purchase the property to Lindh. Lindh did not get any of her investment back in four months as promised by Havens. When Lindh complained about her investment in August and September 2003, Havens told her Tanaka was

challenging the foreclosure of the Brett Lane property in the California Court of Appeal, Third District, in Sacramento. Havens gave Lindh the alleged purchase agreement dated June 7, 2004, purporting to memorialize Marsha Tanaka's attempt to buy back her house from the appellate court in Sacramento. Havens also provided Lindh with an August 2004 calendar purportedly from the appellate court showing that Tanaka's appeal was being heard on August 17, 2004. Havens admitted that numerous documents Havens gave Lindh from June 24, 2004 through July 22, 2004, relating to the Brett Lane property were all fictitious documents he created.

### ***The Warren Investments***

On August 21, 2003, Frank Warren loaned Havens \$104,000 which was to be distributed as follows: \$14,000 to Wayne Terrello, \$15,000 to Marty Bristow, and the remainder was to be invested. Warren received a deed of trust purportedly notarized by Bates, which identified Bristow and his wife as the borrowers and Warren and his wife as the lenders. In January 2008, Marty Bristow told the district attorney's investigator that he never borrowed any money from Havens or signed a deed of trust for \$15,000 that was secured by his house. Terrello also told to the investigator that he did not borrow any money from Havens or sign a deed of trust securing a \$14,000 debt with his house. The investigator checked Bates's notary log and did not find either of the deeds logged in it.

### ***Sentencing***

The information alleged that with respect to the grand theft of March 21, 2003 (count 1), Havens forged the name on Ronald Miller on a "Promissory Note" and an "Extension of Note" (count 2). With respect to the April 8, 2003, theft (count 5), it alleged Havens forged Patricia Randall's name on a purchase agreement (count 7), Kristin Tess's signature on Addendum one (count 8), and Addendum 2 (count 9), and the name of Marsha Tanaka on a purchase agreement (count 10). With respect to the May 30, 2003 transaction (count 11) the information alleged Havens forged the names of

Wayne Terrello and Ryan Bates deed of trust (count 13) and the names of Mary Bristow, Shirley Bristow, and Ryan Bates on another deed of trust (count 14).

On February 2, 2009, the court sentenced Havens to an aggregate term of five years for months as follows: the middle term of two years on count 1, a consecutive eight-month term (one third the middle term of two years) on count 5, an eight month term (one third the middle term of two years ) on count 11, a two year excessive taking enhancement, concurrent terms of two years on each of the forgery counts (3, 4, 7-10, & 13-14) and stayed counts on each of the theft by the false pretenses counts (counts 2, 6, & 12 counts).

### **DISCUSSION**

Havens pled no contest to forgery in counts 3, 4, 7, 8, 9, 10, 13, and 14. The forgeries alleged in counts 3 and 4 were based on the forgeries Havens committed in order to commit the grand theft alleged in count 1 involving the alleged loan to Miller. The forgeries alleged in counts 7, 8, 9, 10 were based on documents Havens forged in order to commit the grand theft alleged in count 5 relating to the alleged purchase of the Brent Lane property. The forgeries alleged in counts 13 and 14 were based on the forgeries Havens's committed in order to commit the grand theft alleged in count 11 involving the loan from Warren. Havens contends that because the forgeries were committed during three continuous courses of conduct that resulted in his three grand theft convictions for which he was punished, the court imposed an unauthorized when it imposed concurrent terms on each of his eight forgery convictions.

Respondent concedes that the concurrent sentence on counts 7, 13, and 14, should have been stayed because they occurred contemporaneously with the theft they corresponded to. Respondent, however, contends that Havens committed each of the other forgery offenses at a different time than the grand theft offense they corresponded to. At that point, Havens's goal was no longer to steal money, but to avoid being caught

and possibly to commit more thefts against the same parties. Thus, according to respondent, section 654 did not prohibit the court from imposing concurrent terms on counts 3, 4, 8, 9, and 10. We accept respondent's concession that the concurrent terms imposed on Havens's forgery convictions in counts 7, 13, and 14, should be stayed and with Havens that the concurrent terms imposed on his remaining forgery convictions in counts 3, 4, 8, 9, and 10, should also be stayed.

“[S]ection 654 prohibits multiple punishments for a single act or omission which may be ‘punishable in different ways by different provisions’ of the Penal Code. Section 654 applies not only where there is but one ‘act’ in the ordinary sense, but also where there is an indivisible course of conduct. [Citation.] ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citations.] ‘If, on the other hand, defendant harbored “multiple criminal objectives,” which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, “even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” [Citation.]’ [Citation.]” (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 124-125 (*Kenefick*).) When applicable, section 654 precludes imposition of concurrent terms. (*People v. Miller* (1977) 18 Cal.3d 873, 877.)

In *Kenefick* the defendant ran a Ponzi scheme that resulted in losses of \$860,000 to several victims. One victim, Donald Howard, invested \$60,000 on one occasion and \$100,000 on a second occasion in defendant's business, Kenefick Investments, and was promised a 10 percent return. In exchange for Howard's \$60,000 investment Kenefick Investments received a promissory note that was secured by a deed of trust allegedly secured by a property owned by Dennis and Susan Cunningham. In exchange for

Howard's \$100,000, investment Kenefick Investments received a promissory note that was secured by a deed of trust on property owned by Kristina Brachna and Alejandro Gonzalez. The defendant forged the Cunninghams' signatures on one promissory note and Kristina Brachna's and Alejandro Gonzalez's signatures on the other promissory note. These transactions resulted in a jury convicting the defendant on one count each of grand theft, burglary, securities fraud, and theft from an elder and four counts of forgery. (*Id.* at pp. 117-118.)

On appeal, the court found that the defendant could be convicted of only two counts of forgery because there were only two forged documents. (*Id.* at p. 124.) Further, in finding that section 654 prohibited the imposition of punishment on the forgery counts the Kenefick court held that the forgeries were preliminary steps in the plan to steal Howard's money. In so holding, the court rejected the People's argument that one objective of the other forged documents was to conceal her theft and fraud and to allow her to commit a second theft. (*Id.* at p. 125.)

Here, even though some of the forgeries occurred after their corresponding grand theft, they were nevertheless, committed as part of Havens's commission of the corresponding grand theft offense. "The fact that one crime is separated in time from the other, or that one is completed before the other is commenced or is an afterthought does not itself make the criminal acts divisible. [Citations.]" (*Burris v. Superior Court* (1974) 43 Cal.App.3d 530, 535-536.) Further, even though the forgeries at issue occurred at different times than the corresponding thefts, they were nevertheless incidental to the commission of the thefts even if Havens's intent was to avoid detection. (*Ibid*, also Cf. *People v. Perry* (2007) 154 Cal.App.4th 1521, 1527 [court stayed sentence on burglary conviction for defendant convicted of robbery and burglary who burglarized a car, confronted owner with weapon, and fled with car stereo, where court found one objective of robbery, to evade capture, was incidental to objective of stealing the stereo].)

Accordingly, we conclude that the trial court violated section 654's ban multiple punishment when it imposed concurrent terms on each forgery count.

### **DISPOSITION**

The judgment is modified to stay the concurrent terms the court imposed on the forgery counts, counts 3, 4, 7, 8, 9, 10, 13, and 14. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.<sup>2</sup>

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<sup>2</sup> Alternatively, Havens contends he was denied the effective assistance of counsel by defense counsel's failure to object in the trial court to the concurrent terms on his forgery offenses if we find that he waived his 654 claims by his failure to object to the imposition of these terms. This issue is moot because the instant opinion addresses Havens's section 654 contentions.